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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 858

DAVID P. LAVIETES,

Petitioner,

vs.

FERRO STAMPING AND MANUFACTURING COMPANY, A MICHIGAN CORPORATION; JOHN H. ROETHEL, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SAMUEL S. WILLIS,
EVANS & MCCOY,
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(Defendants-Appellees).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Hon. Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, David P. Lavietes, Plaintiff-Appellant, respectfully shows:

Summary Statement of Matter Involved.

That the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit entered a final decree

June 25th, 1941, affirming without opinion the decree and opinion of the District Court of the United States for the Eastern District of Michigan, Southern Division, dismissing plaintiff's Bill in equity. A petition for rehearing was filed July 25th, 1941, which was denied October 11th, 1941.

The decisions of both lower courts so far departed from the usual and settled principles of law, as to call for this Court's power of supervision, to prevent a palpable injustice.

This case involves the proper interpretation of two (2) royalty contracts, Exhibits 158 and 159, executed simultaneously September 6th, 1930, and the scope of the subject-matter of this litigation relates to the field of automobile manufacture, and pertains to window regulators constructed in automobile doors. The defendant corporations are the principal producers of this mechanism for the entire industry.

This petition is based upon the alleged error of the lower court in applying settled rules of general law, and the decisions of this Court, to the facts as found in the opinion of the District Court and on the undisputed evidence.

The principal question presented is whether a party who contributes substantial financial aid and time to the development of inventions of another and who negotiates the transaction which results in the successful commercialization of these inventions, is entitled to share in the enormous profits resulting therefrom, even though he is not specifically named in one of the two licensing contracts executed simultaneously. The lower court denied petitioner the right to recover.

The admitted facts as found by the lower court's opinion and in the documents referred to conclusively establish the following:

The petitioner rendered valuable financial aid and assistance to the defendant Roethel from the year 1928 to

1930 in building models, paying expenses of patent attorneys, and the living expenses of Roethel while he worked upon his inventions. The petitioner, through his personal efforts, interested the defendant Ferro Company in the manufacture and production of the window regulator inventions of Roethel, the two principal patents in dispute being the double-arm regulator and the parallel-arm regulator, which were invented by Roethel in the year 1929, and became commercially important; the extent of the success of these inventions was not fully inquired into by the Court, but its magnitude, however, is indicated by the undisputed fact that the Ford Motor Company adopted the double arm regulator in its standard, production and the Ternstedt Manufacturing Company, a subsidiary of the General Motors Company, paid $3,000 to Roethel as a down payment on a license agreement; the royalties paid by the Ferro Company to Roethel were in such an amount that $10,000 thereof was charged to Roethel for expenses incurred in litigating these patents in the Patent Office.

The District Court held that neither of these regulators was comprehended by any agreement, either verbal or written, and denied plaintiff any rights therefrom; a model of the double arm regulator was brought to Detroit by Lavietes in the summer of 1930, which created the interest of the Ferro Company in Roethel's inventions, and resulted in the execution of Exhibits 158 and 159. Roethel came to Detroit under the plans arranged by Lavietes and went to work at the Ferro Company, perfecting the construction of the double arm regulator, which the Ferro Company later did manufacture.

On September 6, 1930, the Ferro Company submitted Exhibit 158 to Lavietes and Roethel, as a complete contract; which was the only contract first submitted. Lavietes and Roethel refused to execute Exhibit 158 unless some provision was made which would prevent the Ferro Com-

pany from claiming shop rights on future inventions of Roethel, by reason of his relationship of employee of the Ferro Company. Thereupon the Ferro Company submitted Exhibit 159, and both of these exhibits were executed at the plant of the Ferro Stamp and Manufacturing Company on the above date. Lavietes and Roethel did not have the services of an attorney in connection with the drafting of these contracts, and no attorney seems to have been employed.

Exhibit 158 provides that all royalties thereunder shall be payable jointly to Lavietes and Roethel. The only inventions specifically referred to in Exhibit 158 are inventions upon which Roethel had previously filed applications for patents in the Patent Office, which were either pending or had been granted. No specific mention was made of the double arm or parallel arm regulator in either Exhibit 158 or Exhibit 159. Exhibit 159 referred specifically, to "all inventions and improvements to the article mentioned in" Exhibit 158, that "may be created by John H. Roethel, whether the same is developed while in the employ of the party of the second part or not" and shall remain the sole property of Roethel; the only method for payment of royalties in Exhibit 159 was "under the same agreements, terms and conditions as set forth" in Exhibit 158. The royalties paid by the Ferro Company to Roethel on the double-arm and parallel arm, must have been made under Exhibits 158 and 159; no patent application had been filed on these inventions prior to September 6, 1930.

Relationship of the Parties.

The findings of the District Court show the relationship of the parties which existed prior to and on September 6, 1930, as that of contemplating an equal division of any profits that might be derived from their joint efforts.

The District Court described the arrangement between Lavietes and Roethel as follows:

> "That Roethel says to Lavietes, 'I am poor I haven't got any money. I have got a wonderful head and I am full of inventions and I have made a lot of them here that are dandies and I can grind them out every day. I am a wizard and if you can take some of these things and get some money out of it I will split with you.' I think they generally talk in 50-50 terms just indefinite talk."
>
> * * * There is not any question but they called each other partner and maybe worse things than that."

CONSTRUCTION OF EXHIBITS 158 AND 159.

Plaintiff claims *that these two (2) instruments should be construed as one contract, and by their literal interpretation, as a matter of law, would grant to Lavietes an equal share of the royalties on window regulator inventions, particularly those which existed as of September 6, 1930, being the double arm and parallel arm regulators;*

Also *that in equity and good conscience plaintiff should share in the royalties from the window regulators upon which patent applications were filed after September 6, 1930, based upon the circumstances surrounding the execution of Exhibits 158 and 159, considering the facts leading up to their execution, and what transpired subsequent to September 6, 1930.*

A construction of the two contracts as one instrument was prayed in the plaintiff's Bill of Complaint (R. 34, Par. 5), though the Bill also alleged fraud in the execution of said Exhibit 158, in its failure to include the double arm and parallel arm inventions on window regulators for which patent applications had not been filed.

The District Court has found that Exhibits 158 and 159 are valid and free from fraud as to the execution of same,

but the court failed to construe these two agreements as one instrument, and denied plaintiff the right to share in any royalties.

CONDUCT OF PARTIES SUBSEQUENT TO EXECUTION OF CONTRACT.

All of the contracting parties for some months following the execution of the Exhibits 158 and 159 interpreted them as granting unto Lavietes an equal share of the royalties on all window regulator inventions, irrespective of whether patent applications had been filed. September 18th, 1930, Roethel telegraphed Lavietes requesting One Hundred Seventy-five ($175.00) Dollars to pay a Detroit lawyer, and that "if the pattens are not proteckedt we will lose everything." This related to the double arm regulator.

Lavietes immediately wrote Mr. Devereaux, President of Ferro, requesting him to pay the attorney's fee, and charge the expense to the royalty account of Lavietes and Roethel in accordance with the contracts, but that if Mr. Devereaux did not pay, he, Lavietes, would borrow the money to take care of the expense. Lavietes again wrote Mr. Devereaux to the same effect on October 10th, 1930, and Mr. Devereaux at no time made any objection to such an arrangement.

On November 10th, 1930, petitioner again wrote Mr. Devereaux requesting a sample of the perfected double arm regulator, in order that petitioner might show it in Syracuse, New York. Mr. Devereaux replied that no duplicates were available, but did not advise Lavietes that Lavietes was not entitled to any rights therein.

Under date of December 2, 1930, the Ferro Co. wrote to Lavietes requesting Lavietes to agree to a modification to the terms of Exhibit 158, so as to permit Ferro to withhold the payment of royalties pending any patent dispute, which then seemed to be in the offing relating to the double arm regulator. This, Lavietes refused to acquiesce in, except to

the possible extent of permitting Ferro to withhold one-half (½) of the royalties, pending any patent litigation.

On September 18th, 1932, Roethel wrote to Lavietes concerning the double arm regulator, which, he said, was standard equipment on all new Ford cars, and "If we win the patent then we can collect a royalty on all Ford regulators", also "and if you and I will not help together and keep everything that we know to ourselves we will lose everything * * *. Please destroy this letter after reading it".

In the same letter Roethel stated that he had been in Detroit two (2) years and hadn't received any royalties. This was a false statement and a concealment of the fact that Roethel had received Three Thousand ($3,000.00) Dollars from the Ternstedt Manufacturing Company approximately five (5) months before this letter was written.

In May, 1933, the defendants offered in evidence in the patent interference proceedings the testimony of Lavietes that he was financially interested in the double arm regulator. He was not permitted to testify to the extent of his interest, except that it was a substantial one. The patent litigation resulted favorably to Roethel.

Reasons Relied On for Allowance of Writ.

The Plaintiff-Appellant shows as reasons for allowance of the writ that the lower court has decided an important question of local law in a way in conflict with the applicable local decisions, in conflict with the weight of authority, and in conflict with the decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The lower court's decision that the devices and inventions upon which the royalties were paid were not comprehended within the terms of the contract made on September 6, 1930, is against the terms of the contract as shown by the evidence and intention of the parties.

The lower court's decision that petitioner, Lavietes, was not entitled to share in the royalties accruing from Roethel's inventions paid since September 6, 1930, is against the established principles of law and the facts, as more particularly set forth in petitioner's supporting brief.

Prayer.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit commanding that court to certify and to send to this Court for its review and determination on a day certain to be named, a transcript of the record and proceedings herein, and that the decree of the United States Circuit Court of Appeals for the Sixth Circuit be reversed by this Honorable Court, and that Petitioner and Appellant be granted the relief prayed for in his bill and that the cause be remanded to the District Court for the Eastern District of Michigan, Southern Division, for an accounting of the royalties and profits which have accrued to the plaintiff by reason of said contracts, as prayed for in his bill, and petitioner and appellant have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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(Defendants-Appellees).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Grounds for Jurisdiction.

This Court has jurisdiction of this matter by virtue of Section 240, (a) of the Judicial Code as amended by Act of February, 1925, being 28 U. S. C. A. Section 347 (a),

governing appeals by certiorari from the Circuit Court of Appeals to the Supreme Court.

II.

Decree of the Circuit Court of Appeals.

The Circuit Court of Appeals delivered no opinion but merely adopted the opinion of the lower court and affirmed it as follows:

> This cause having been submitted upon the record, briefs and argument of counsel for the respective parties, and it appearing to the Court for the reasons stated in the lower court's opinion, findings of fact and conclusions of law, that its decree in all respects should be affirmed, it is so ordered.
>
> Entered June 25th, 1941.

Opinion of District Court.

The opinion of the District Court was delivered by the Honorable Arthur J. Tuttle on December 17th, 1937, but has not been reported. It contains twenty-nine (29) printed pages, found in the record (R. 91-120, inclusive).

Nature of Case.

This is a suit in equity to construe two (2) contracts, Exhibits 158 and 159 (R. 1188-A to 1188-D, Vol. III), as one (1) instrument, both having been executed simultaneously, under which agreement the plaintiff was denied an accounting by the District Court. The District Court determined that the two contracts are separate instruments and that plaintiff had no rights under Exhibit 159, although this contract expressly referred to Exhibit 158 as a part thereof, in providing that the royalties due thereunder shall be payable on the same agreements, terms and conditions contained in Exhibit 158, under which contract plaintiff was

entitled to one-half (½) of the royalties. The construction given by the District Court, and affirmed by the Circuit Court of Appeals, is against the intent of the parties, as disclosed by the two instruments and the undisputed testimony, and is contrary to the general principle of law and the decisions of this Court.

This Honorable Court has jurisdiction of this case, under the statute above quoted, and we refer to cases cited under 28 U. S. C. A. 347, including

Warner v. *New Orleans,* 176 U. S. 474;

Forsythe v. *City of Hammond,* 166 U. S. 506.

Statement of the Case.

The facts stated below are undisputed except where otherwise indicated.

In the early part of 1928 defendant Roethel operated a small automobile body repair shop in Brooklyn, N. Y. He had three patents for vehicle window regulators. Plaintiff, Lavietes, was a salesman particularly experienced in the sale of automobile accessories, and had known Roethel for a short time prior to 1928. Roethel, who had tried unsuccessfully to market his inventions, through his own efforts and the assistance of others, was deeply in debt at the time. His financial backers refused to furnish any more money for what seemed a hopeless venture. He convinced Lavietes, the plaintiff, however, that he had many improvements in mind upon his inventions which could be perfected and marketed. Lavietes claims an agreement was finally made between the two during the summer of 1928 whereby Lavietes was to finance the work and to market the inventions upon the understanding that whatever profits might accrue would be shared equally between them.

Lavietes paid the costs of the numerous trips and other expenses incurred by him in his efforts following 1928 to commercialize these inventions, and furnished money for

Roethel's living expenses, who was constantly busy attempting to improve his devices.

The District Court described the arrangement between Lavietes and Roethel, in a part of its opinion, as follows:

(R. 100):

> "* * * but undoubtedly they talk about a 50-50 and that seems to be the usual thing for inventors and helpers to talk about, but it is that sort of indefinite tangible understanding that these men had, always looking forward to a day when, if anything developed and there was some money in sight, that they would make a definite agreement, and each trust in the other."

(R. 101):

> "The agreement was that if they get something, they get a prospect somewhere he (Lavietes) would bring this back and show it, tell it to Roethel, and if Roethel was satisfied, and the other party would stick and keep, why, then, that is where Lavietes got something out of it."

During the year 1929 Roethel developed what are called the double arm and parallel arm window regulators. Models of the improved devices were made at the expense of Lavietes, who then went out to either sell them or interest someone to manufacture same. By this time Lavietes had been compelled to borrow money on his insurance to continue work.

Lavietes brought a model double arm regulator to Detroit and showed same to the Engineer of Briggs Manufacturing Company, a large manufacturer of automobile bodies. The engineer called in Mr. Fairbanks, the Sales Manager of defendant, Ferro Stamping and Manufacturing Company, a large supplier of parts for the Briggs Manufacturing Company. At the suggestion of the engi-

neer, Mr. Fairbanks took Lavietes to see Mr. Devereaux, President of the Ferro Company, where the window regulators were demonstrated.

After Mr. Devereaux learned that the Lincoln Division of the Ford Motor Company had commended the device in addition to the engineer of the Briggs Manufacturing Company, negotiations were begun about June, 1930, towards the granting of a license to the Ferro Company, for the manufacture of the Roethel inventions.

On August 15, 1930, Ferro agreed to take a license and upon the insistence of Lavietes agreed to hire Roethel as an engineer to supervise the work of perfecting the design of window regulators at a salary of One Hundred ($100.00) Dollars per week. Five Hundred ($500.00) Dollars was paid to Lavietes on that date to bind the bargain, and he gave a receipt in which the inventions were described as:

> "Patents and patents pending owned by John H. Roethel and controlled jointly by Mr. Roethel and myself." (R. 1184).

Lavietes then went to New York to arrange for the removal of Roethel to Detroit, and Roethel started to work for the Ferro Company on September 2, 1930.

The final draft of the agreement, Exhibit 158, was ready for signature on September 6, 1930, and Lavietes was called to the Ferro Company offices to execute the agreement. The agreement as presented, however, was not satisfactory to Lavietes because it did not give protection against possible claims of Ferro to shop rights on inventions which might be made by Roethel while in their employ, so a supplemental agreement was prepared by Ferro (Exhibit 159). Both instruments were thereupon signed simultaneously.

The balance of the down payment, or Twenty-Five Hundred ($2,500.00) Dollars, was paid on September 6th, 1930.

September 2nd, 1930, Roethel had started to perfect the construction of the double arm window regulator in the Ferro Company shops and completed it on September 9th, 1930. Shortly thereafter he made a model of his parallel arm regulator. Patent applications for the two inventions were duly filed thereafter. On September 15th, 1930, Roethel reported the completion of a "Perfekt" model regulator to Lavietes, and asked Lavietes to pay Judge Galston for the patent expenses of prior window regulators, which Lavietes did on September 17th, 1930.

On September 18th, 1930, Roethel telegraphed Lavietes:

"Fer money to my wife for expenditures to Detroit",

and said he had to pay his patent "lawer" in Detroit One Hundred Seventy-Five ($175.00) Dollars tomorrow, and that "if the pattens are not proteckedt we will lose everything" (R. 1197 and 1039):

Lavietes replied that he had written to Mr. Devereaux requesting him to pay the attorneys and charge the expense to the account of Lavietes and Roethel in accordance with the contracts, but that if Mr. Devereaux did not pay it, he, Lavietes, would borrow the money to take care of the expense (R. 1198-B). Lavietes wrote to Mr. Devereaux also and asked Ferro Company to pay the patent expense and to charge it to the joint account of Roethel and Lavietes (R. 1198). On October 10, 1930, Lavietes again wrote Mr. Devereaux to the same effect (R. 1202), but Mr. Devereaux never made any objection thereto. On October 20, 1930, Lavietes asked Mr. Devereaux for a sample double arm regulator (R. 1204) and Mr. Devereaux replied on October 31st, 1930 (R. 1205) as follows:

> "In answer to your several letters, the writer has been laid up with illness, or so busy * * * I have been unable to go into the several matters mentioned. * * * We are having some encouragement from

Ford and Durand on regulators, and I believe that we will be able to do some real business when there is any new business to be secured."

On November 10th, 1930, plaintiff, Lavietes, again wrote Mr. Devereaux and requested a sample of the perfected regulator in order that he might show it in Syracuse and Brooklyn. On November 11th, 1930, Mr. Devereaux replied that no duplicates were available.

On November 10th, 1930, Lavietes having learned that Roethel had been in New York and had not called to see him, wrote Roethel as follows:

"* * * Your attitude towards me after all I have gone through to put the regulator into the Ferro Company is not so good and if you feel it is asking too much to keep me posted, do not answer this letter.

"Your telling people that I got $3,000 for my own use from the Ferro Stamping Co. is not the truth, as I received $1,500 as my share, $500 without interest as payment for personal loan to you, when you needed same to meet mortgage on your house, and $500 as half of the $1,000 that you received from Jesse Jacobs,* which I was forced to pay with interest as you are well aware, the note having been signed in your office in Brooklyn.

"I know full well that you through Mr. Brashner offered to sell your inventions to Mr. Fisher, when you were supposed to be on a trip to a wedding in Indianapolis.

"Straight shooting and plain honesty pay big dividends and I hope from now on you will treat me as I have always treated you. With best regards to the family, I am,

Very truly yours."

* This reimbursement to Jacobs is confirmed by both Jacobs (R. 656, 659) and Roethel (R. 1031).

An interference was declared in the patent office upon the applications of Mr. Roethel and it became necessary

to prove the date of conception of the two inventions. On September 18th, 1932, in connection with such interference proceedings, Roethel wrote Lavietes as follows:

> "I have filed applications in the U. S. Patent Office, and I am informed from Washington that Dura Company from Toledo and Briggs, Stratton, and Milwaukee have the same applications on file. * * * We must prove the earliest date of the invention. * * * I am sure they stole their invention from us. The regulator is standard equipment on all new Ford car and Dura Co. of Toledo is the only one supplying Ford with the regulator. * * * If we win the patent then we can collect a royalty on all Ford regulators. * * * 'I am here in Detroit two years, and didn't receive any royalties yet. * * * And if you and I will not help together and keep everything that we know to ourselves we will lose everything. * * * Please destroy this letter after reading it." * * *

Roethel had in fact received Three Thousand ($3,000.00) Dollars from Ternstedt five (5) months before (See Physical Exhibit 239, p. 332, also Exhibit 225, R. 1238).

The Ferro Stamping and Manufacturing Company, by its Assistant Treasurer, D. E. Allen, wrote to Lavietes under date of December 2nd, 1930 (Exhibit 187, R. 1210), which enclosed a proposed amendment to Exhibit 158, so as to permit the suspension of royalties accruing during the period which any suit mentioned in paragraph 7 might affect the payment of royalties. The application for the double arm and parallel arm inventions of Roethel had then been filed in the patent office, and this proposed amendment evidently applied to the double arm and parallel arm regulators, as Ferro was preparing for production on these regulators—the interference proceedings in the patent office involving these inventions developed subsequent to this letter. No interference proceedings were had in the patent

office relating to the patents which were specifically mentioned in Exhibit 158, and were never commercialized.

Exhibit 187 uses the following language:

> "Dear Mr. Lavietes:
>
> "With reference to our agreement with you dated Sept. 6, 1930 concerning the manufacture and sale of Vehicle Window Regulators we submit herewith a paragraph, indicated as No. 7-A, which we believe should be incorporated in the original agreement.
>
> "The purpose of same is to clarify the procedure involved in paragraph 7. Mr. Roethel has signed same.
>
> "If you will kindly sign each of the three copies and return to the writer we will then have Mr. Devereaux's signature inscribed and your copy returned to you."

The commercial manufacture of the regulators was commenced in March of 1931, but Lavietes was never informed of the fact. Roethel received an advance royalty from Ternstedt Mfg. Co. in April of 1932, yet in the letter written on September 18, 1932 recited above, he wrote Lavietes:

> "I am here in Detroit two years and didn't receive any royalties yet."

On April 22, 1931, Mr. Devereaux replying to the inquiry of Lavietes, as to progress being made in the perfecting and manufacturing of the window regulators, replied:

> "We are making some progress with this type of lift, but to date have not secured any orders."

The Ferro Co. was in production on Roethel's parallel arm regulators at the time. On February, 1932, in answer to an inquiry from Mr. Lavietes, the plaintiff, Mr. Devereaux replied:

> "* * * Roethel is still with us and is capable and enthusiastic worker. We are all hopeful that sometime in the future favorable results will be obtained."

On January 11, 1933, Lavietes wrote to Mr. Devereaux and asked him for a clear statement as to the situation regarding the window regulators. On January 17, 1933, he received the following reply:

> "Up to the present time Mr. Roethel has not developed any window regulators which we have manufactured that could be construed as coming under the terms of our agreement with you. * * *
>
> "Eventually it is more than likely that Mr. Roethel's patents will be allowed, but we can do nothing to stop this infringement until his patents are issued. * * *"

During this time the interference proceedings were pending in the patent office and Lavietes was procuring evidence in New York relating to the matter of priority. In May, 1933, the testimony of Mr. Lavietes in the double arm interference was taken on behalf of Roethel in New York and under direct examination by defendant Gray, Lavietes testified in detail as to his efforts and expense in connection with the development of the double arm regulator and the marketing of it. Lavietes testified that he was financially interested in the invention, but upon Mr. Gray's objection he was not permitted to testify the extent of his interest except that it was a substantial one.

In the early part of January, 1934, Lavietes first learned from the vice-president of Ternstedt Manufacturing Co. that $3,000 in royalties had been paid to Roethel, and as a result of which Lavietes wrote Roethel on January 10, 1934, as follows:

> "I am not making any claim to my one-half interest in your deal with Ternstedt Manufacturing Co., as I did not give you permission to enter this, or any other deal without my written consent, I being bound by contract to Ferro Stamping Co."

The letter written by Lavietes to Roethel was turned over to defendant Gray who, for the first time notified plaintiff

Lavietes that he, Lavietes, is laboring under a "misunderstanding as to the extent of the contract which you made with the Ferro Co."

In the interference proceedings Roethel was found to be the prior inventor and patents were duly issued to him. After the receipt by Lavietes of the letter written by Mr. Gray, efforts were made to adjust the matter between the parties, but when they proved unsuccessful, suit was commenced by the plaintiff.

The bill charges conspiracy to defraud. It sets out in detail all of the acts of the various parties relating to this matter, the oral contract made by Lavietes and Roethel, the subsequent written agreements and the acts of the parties thereafter to the date of the filing of the bill. The prayer in the bill asks for construction of the written instruments, reformation of the written instruments, accounting and injunction among other things. The bill has the usual prayer for general relief.

It was definitely established by the evidence that the double arm regulator had been invented by Roethel prior to the execution of the contracts on September 6, 1930, as in the interference proceedings he testified as follows:

(Physical Exhibit 239, referred to R. 1249):

> "Q. 153. I will show you this regulator which is Exhibit 7 (double arm regulator) and ask you if you know anything about that? A. * * * That is a Ford type regulator. * * *
>
> "Q. 158. How soon after you went to work for Ferro on September 6, 1930 did you start work on this regulator? A. I worked before I signed the contract.
>
> "Q. 159. Do you remember when you completed the regulator Exhibit 7? A. According to the stamp on it, September 9" (1930).

Specifications of Error.

Petitioner contends that the Circuit Court of Appeals, by its decree, which affirmed the opinion and findings of fact

and law of the District Court, dismissing plaintiff's suit, and denying him the relief prayed, committed manifest error.

Summary of Argument.

A. Intent of the parties govern the interpretation of contracts.

United States v. *Choctaw*, 179 U. S. 494, 45 L. Ed. 291, 21 S. Ct. 149;
George v. *Tate*, 102 U. S. 564, 26 L. Ed. 1050;
Hubbard v. *Miller*, 27 Mich. 15;
Reid v. *Shaffer*, 249 Federal 553;
Stair Corp. v. *Taylor*, 39 F. (2d) 788;
Cleveland v. *Detroit Trust Co.*, 264 Mich. 253;
Detroit Trust Co. v. *Manilow*, 272 Mich. 211;
Hammond, et al. v. *The Mason & Hamlin Organ Company*, 92 U. S. 724, 725, 23 L. Ed. 767, 768;
Doherty Research Co. v. *Vickers Petroleum Co.* (C. C. A. 10), 80 F. (2d) 809, 811, Cert. Den. 81 L. Ed. 401;
Mobile Railroad Co. v. *Jurey*, 111 U. S. 584.

B. Defendants are estopped from claiming that plaintiff-appellant is not entitled to one-half of the royalties under the contract.

Daugherty v. *Byles*, 41 Mich. 61;
Fenton v. *Steere*, 76 Mich. 405;
Nielson v. *Eiler*, 248 Mich. 545;
Home Insurance Co. v. *Field*, 53 Ill. Appeal 119;
Sweetser v. *Jordan*, 211 Mass. 393.

22 *Corpus Juris*, p. 329, states:

> "So far as its competency in evidence is concerned, the admission may be made either in the case in which it is sought to be used or in some other action."
>
> *Shelton* v. *Southern Railroad Co.*, 225 Fed. 182;
> *Cline* v. *Wilson*, 128 Mich. 255;
> *Billingsley* v. *Gulick*, 256 Mich. 606;

Gates v. *Detroit Railroad Co.*, 158 Mich. 477;
People v. *Finn*, 162 Mich. 481;
Carver v. *Detroit & Saline Plank Road Co.*, 126 Mich. 458.

C. Plaintiff-appellant is entitled to recover upon an accounting for the royalties and profits received by the defendants.

E. R. Squibb & Son v. *Mollinck Chemical Works*, 69 F. (2d) 685;
Gulf Smokeless Coal Co. v. *Sutton, Steele & Steele*, 35 F. (2d) 433;
Walker Grain Co. v. *Southwestern Telephone & Telegraph Co.*, 10 F. (2d) 272;
Skinner Bros. Belting Co. v. *Oil Well Improvement Co.*, 54 F. (2d) 896;
A. C. Motor Freight Lines v. *Singledecker*, 70 F. (2d) 827.

ARGUMENT.

A. Intent of the Parties Govern the Interpretation of Contracts.

The contracts, Exhibits 158 and 159, included in their scope the parallel and double arm regulators. The two instruments must be construed as one contract.

In *Hammond, et al.* v. *The Mason and Hamlin Organ Company*, 92 U. S. 724, 725, 23 L. Ed. 767, 768, this Court says:

> "Where an inventor signed several different agreements with the same party, on the same day, for the sale of his invention and for a license to use it, they must be all construed together."

As the court says in *Doherty Research Co.* v. *Vickers Petroleum Co.* (C. C. A. 10), 80 F. (2d) 809, 811, Cert. Den. 81 L. Ed. 401:

> "They (the several instruments are integral and interwoven parts of the whole; they constitute the suc-

> cessive steps taken in originating and consummating the transaction. It cannot be said that the assignment with a separate agreement, is complete and inexhaustive within itself to the exclusion of the other instruments. * * * The several instruments bear the same significance in law as though their respective provisions were incorporated in a single writing and should be read together in determining the real intent and agreement of the parties."

The intention of the parties to include all window regulators in the agreements, Exhibits 158 and 159 to which Lavietes is entitled to one-half of the royalties, may be gathered from the circumstances surrounding the execution of Exhibits 158 and 159.

In *Mobile Railroad Co.* v. *Jurey*, 111 U. S. 584, this Court says:

> "The intention of the parties must be ascertained from the nature of the agreement, the circumstances leading up to and attending its execution, the relation and condition of the parties, the situation of the subject matter, and the apparent purpose of the contract. * * *
>
> Even 'where a strict and literal construction of the contract does not convey the real meaning of the parties, such construction is not to be entertained.' Seralles *v.* Esbri, 200 U. S. 103; U. S. *v.* Utah, N. & C. Stage Co. (U. S.), *supra;* Walden *v.* Skinner, 101 U. S. 577, 25 L. Ed. 963. '* * * the grammatical rule raises only a *prima facie* presumption and does not preclude the settling of the meaning (of the contract) by detracting somewhat from the exactness of the language in order to give effect to more cogent reasons of another sort.' Cowles Electric Smelting Co. *v.* Lowery (C. C. A.-6), 79 Fed. 331, 340. 'The contract must be read according to the intent of the parties in spite of clerical errors and omissions.' 17 C. J. S. 734."

That this conclusion is inescapable appears from a cursory reading of the two instruments. The second paragraph of Exhibit 158 reads:

> "Whereas, the parties of the first part have '*made certain improvements*' (emphasis ours) in vehicle regulators who owned the patents bearing the numbers * * *."

Followed by description of the patents, "and have applied for letters patent of the United States therefor, the applications bearing the serial numbers".

Followed by the numbers of the applications,

> "And whereas, the second party is desirous of obtaining an exclusive license under said application and letters patent that may issue for said inventions."

On September 6, 1930, when the agreement was made, every one of the patents described were upon devices which had been proven worthless. Application No. 323,103 had been rejected. The other application was on a device that likewise was unmarketable, and which Lavietes did not even try to sell. The only devices shown to the engineer and to Mr. Devereaux were the double arm and parallel arm regulators for which no applications had yet been filed. It is, therefore, inconceivable under those circumstances that it was intended by any of the parties to the agreement to limit it to the particular devices for which patents had issued or for which applications had been filed.

Paragraph 6 of Exhibit 158 provides that the parties of the first part, that is Lavietes and Roethel, shall diligently prosecute the application or applications for letters patent covering said inventions, and it also provides that the parties of the second part—that is, the Ferro Stamping and Manufacturing Co., shall have the privilege of *applying for* and securing patents in the event that parties of the first

part do not do so, and it may charge the expense of obtaining such patents against the royalty account. The sixth paragraph becomes meaningless if the contract is limited to the devices mentioned by number because patents had already issued, or applications had been filed for them already. That this was the intent is further shown by the second paragraph of the supplemental agreement, Exhibit 159, which provides:

> "It is hereby understood and agreed that all *inventions and improvements to the article* mentioned in the agreement between John H. Roethel and David P. Lavietes, and Ferro Stamping & Manufacturing Co., * * * that may be created by the said John H. Roethel, whether the same is developed while in the employ of the party of the second part or not, shall remain the sole and separate property of the said John H. Roethel, * * * provided, however, that the said party of the second part shall have the prior right and option to the manufacture and sale of said article *under the same agreements, terms and conditions as set forth in the before mentioned agreement.*" (Emphasis ours.)

The articles mentioned in Exhibit 158 are vehicle window regulators so the inventions and improvements to such article must mean inventions and improvements to vehicle window regulators. Under that paragraph the Ferro Co. obtained the right to the manufacture and sale of such inventions and improvements to the article mentioned under the same agreements, terms and conditions set forth in Exhibit 158. The agreements, terms and conditions in Exhibit 158 were, among other things, that the royalty must be paid to parties of the first part, that is, to David P. Lavietes, the plaintiff, and John H. Roethel, defendant.

When the attention of the trial court was called to this, he found that the double arm and parallel arm regulator

inventions were not included "in any of the contracts that I have."

The intention of the parties, as above indicated, is also consistent with the acts of the parties after the execution of the agreements. To assume that the defendants have paid Roethel a huge sum of money for royalties on devices not included in any agreement is absurd on its face. Indeed the defendant's position throughout the trial has been that the double arm and parallel arm regulator come within the scope of the third paragraph of Exhibit 159. Yet a reading of that paragraph clearly shows it had reference to articles "other than the one herein mentioned." The one herein mentioned was window regulators. Obviously, the third paragraph excludes inventions and any improvements on vehicle window regulators. Indeed counsel for the defendants in his briefs filed with the lower court made no effort at all to answer the plaintiff's argument upon proper construction of the contracts. Defendants' main argument was on the point that the bill was filed upon the theory of a conspiracy only, and that the testimony introduced by the defendants in the interference proceedings which testimony showed that Lavietes, the plaintiff, had a substantial interest in the inventions, was improperly admitted in evidence. Upon the undisputed evidence in this case and under the written contracts, the plaintiff is entitled to an accounting and a recovery of his share of the royalties.

B. Defendants Are Estopped From Claiming That Plaintiff-Appellant is Not Entitled to One-Half of the Royalties Under the Contract.

Defendants are estopped from claiming that the contracts were limited to the patents and applications described by number in Exhibit 158. The defendants' contention

that the evidence introduced by them in the interference proceedings was inadmissible in this case is clearly wrong. It was not only admissible but estops them from now asserting that Lavietes had no interest in the double arm or parallel arm inventions. Admissions, whether made orally by conduct or in writing, are always admissible as evidence to show that the contention of a party is not correct.

Daugherty v. *Byles,* 41 Mich. 61;
Fenton v. *Steere,* 76 Mich. 405;
Nielson v. *Eiler,* 248 Mich. 545;
Home Insurance Co. v. *Field,* 53 Ill. Appeal 119;
Sweetser v. *Jordan,* 211 Mass. 393.

22 *Corpus Juris,* p. 329, states:

> "So far as its competency in evidence is concerned, the admission may be made either in the case in which it is sought to be used or in some other action."

Any and all evidence even if introduced by the defendants in any other case is admissible as an admission against interest. The case, however, upon this point is far stronger than merely an admission.

The defendants by their letters and conduct induced the plaintiff to assist in the obtaining of a patent upon these two devices. Knowing that the plaintiff claimed a one-half interest in them, they offered plaintiff's testimony in the interference proceedings. As a result of that testimony among other things, Roethel obtained the patents. When the defendants introduced plaintiff's testimony in that case, it was offered as the truth. It was offered for the purpose of inducing the patent office to act upon it. It was offered with full knowledge of the plaintiff's claim. The defendants will not now be permitted to assert that the very testimony they themselves offered which they obtained by

misleading the plaintiff, and which induced the patent office to act in their favor, was not the truth. They can't assert that the plaintiff was telling the truth in the interference case and now assert that the same testimony was false.

Shelton v. *Southern Railroad Co.*, 225 Fed. 182;
Cline v. *Wilson*, 128 Mich. 255;
Billingsley v. *Gulick*, 256 Mich. 606;
Gates v. *Detroit Railroad Co.*, 158 Mich. 477;
People v. *Finn*, 162 Mich. 481;
Carver v. *Detroit & Saline Plank Road Co.*, 126 Mich. 458.

The plaintiff submits that the defendants are estopped from contending that the plaintiff is not entitled to one-half of the royalties.

C. Plaintiff-Appellant is Entitled to Recover upon an Accounting for the Royalties and Profits Received by the Defendants.

Plaintiff is entitled to recover upon an accounting for the royalties and profits received by the defendants upon the bill filed. The defendants contended vigorously that the court is limited to the question of conspiracy in deciding this case. As we have already indicated, the bill did charge conspiracy, but in addition thereto, it recited all of the facts relating to this case in detail so that even if the conspiracy were regarded as surplusage, it would yet assert a claim upon contract, reformation and accounting. Even if the bill had charged a conspiracy, when it charged all of the facts proven in the case giving the plaintiff relief upon contract, reformation and accounting would only involve the change of a legal conclusion and not any change in proof. Certainly a change in the legal conclusion is not even ground for an adjournment because of surprise.

But even if the bill had completely omitted mention of all of the facts necessary to sustain an action on contract under former Equity Rule 19, the present rule 15 (b) and under the decision of the Federal Courts, the plaintiff is entitled to the relief which his proofs indicate. In such a situation if an amendment to a pleading is necessary to cover the proofs admitted in a case, such amendment may be made even in the Appellate Court. A judicial proceeding is not merely an exercise in legal technicalities. The courts exist for the purpose of administering justice and to right wrongs and whenever it can be done, mere technicalities will be overlooked in order to attain justice. In the final analysis it is the proofs that determine questions of right and wrong.

The following cases, among others, have held that the decision must be based upon the proofs irrespective of technical deficiencies or omissions in the pleadings, and that if it is necessary the pleadings can be amended even in the Appellate Court, or they will be regarded as amended to make them conform to the proofs in the event that it becomes necessary to do so for the ends of justice.

E. R. Squibb & Son v. *Mollinck Chemical Works,* 69 F. (2d) 685;

Gulf Smokeless Coal Co. v. *Sutton, Steele & Steele,* 35 F. (2d) 433;

Walker Grain Co. v. *Southwestern Telephone & Telegraph Co.,* 10 F. (2d) 272;

Skinner Bros. Belting Co. v. *Oil Well Improvement Co.,* 54 F. (2d) 896;

A. C. Motor Freight Lines v. *Singledecker,* 70 F. (2d) 827.

Conclusion.

Because of the reasons hereinbefore set forth, plaintiff-appellant submits that he is entitled to the writ and relief prayed for in his petition.

Respectfully submitted,

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(27)

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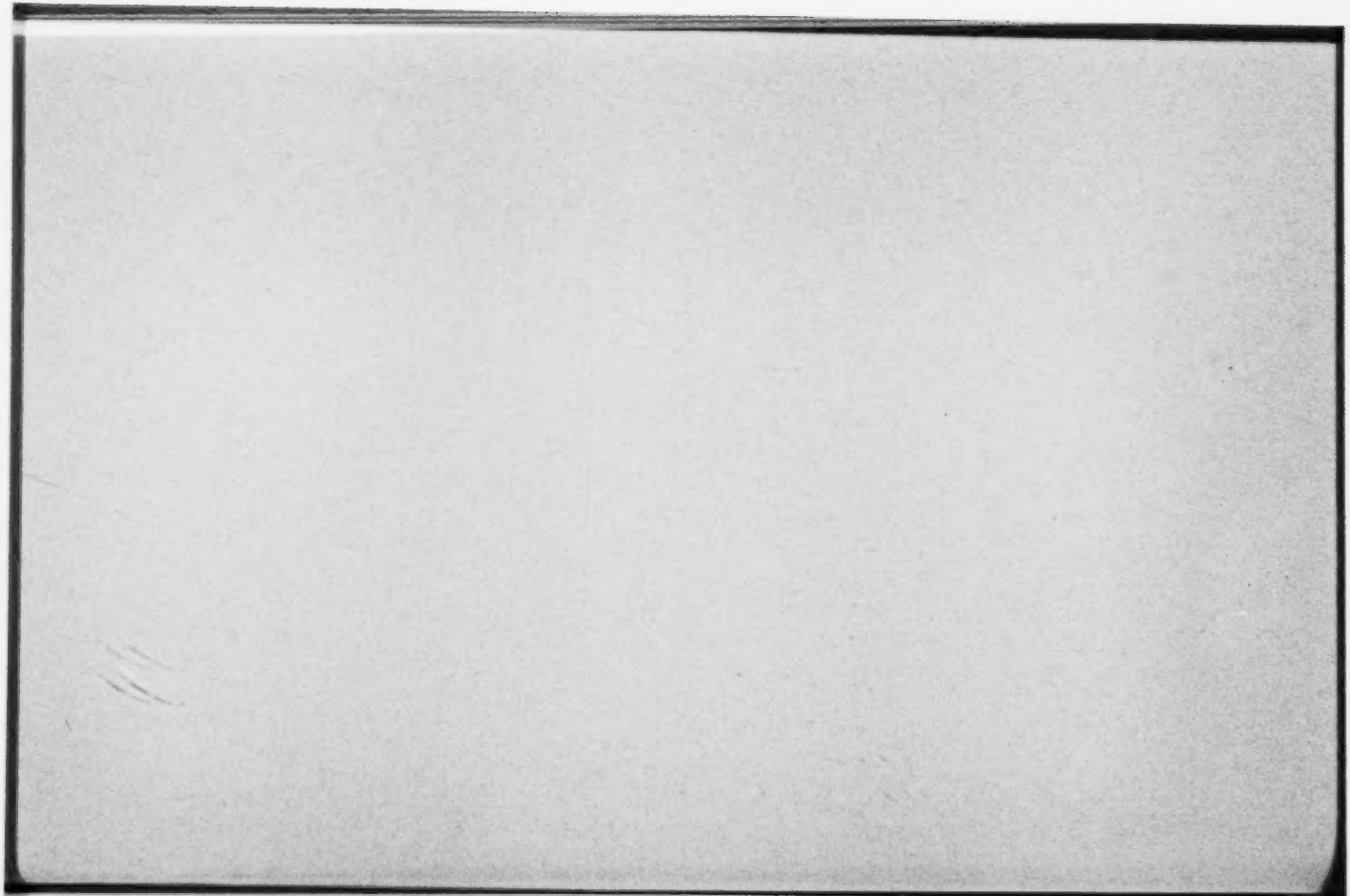
No. 858

DAVID P. LAVIETES,
Petitioner,
v.
FERRO STAMPING AND MANUFACTURING COMPANY,
a Michigan corporation,
JOHN H. ROETHEL,
DETROIT HARVESTER COMPANY, et al.

BRIEF FOR RESPONDENT, DETROIT HARVESTER COMPANY IN REPLY TO PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Detroit Harvester Company.

BEARDON-PARSHALL CO.



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In The

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BRIEF FOR RESPONDENT, DETROIT HARVESTER COMPANY IN REPLY TO PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is filed on behalf of the respondent, Detroit Harvester Company, one of the several defendants in the District Court. Since nowhere in petitioner's "Statement of the Case" is this respondent mentioned, we supply the following additional statement of facts.

Detroit Harvester Company was made a defendant in this case as the successor of Dura Company, an Ohio

corporation. The assets of Dura Company were purchased by Detroit Harvester Company prior to commencement of this action and subsequent to execution of a license agreement between the defendant Roethel, as licensor, and Dura Company and the defendants, Ferro Stamping and Manufacturing Company and Briggs & Stratton, as licensees. Petitioner's bill of complaint in the District Court sought cancellation of this license agreement which was made pursuant to a settlement of interference proceedings in the Patent Office. The bill of complaint made extensive charges of fraud and conspiracy against the defendants. The District Court found these charges to be groundless and, on appeal, petitioner for the first time contended, as he does in his present petition, that the suit "is a suit in equity to construe two contracts". Neither Dura nor Detroit Harvester Company is, or ever was, a party to the two contracts (Exhibits 158 and 159) which petitioner claims he seeks to construe. We respectfully urge upon the Court the following propositions:

I. A WRIT OF CERTIORARI SHOULD NOT BE GRANTED AS AGAINST THIS RESPONDENT IN A "SUIT TO CONSTRUE TWO CONTRACTS" TO WHICH THIS RESPONDENT IS NOT A PARTY.

II. IN ANY EVENT THIS ACTION IS NOT SUCH AS TO CALL FOR THE EXERCISE OF THIS COURT'S DISCRETIONARY POWER TO GRANT ITS WRIT OF CERTIORARI.

ARGUMENT

I. A Writ of Certiorari Should Not be Granted as Against This Respondent in a "Suit to Construe Two Contracts" to Which This Respondent is Not a Party.

It is a fair statement of petitioner's bill of complaint that the bill charges a fraudulent conspiracy among all of the defendants to deprive the plaintiff of an undivided one-half interest in certain patents which plaintiff claimed under an alleged oral contract with defendant Roethel. The District Court held that there was no fraud or conspiracy and plaintiff has abandoned the claim of fraud on appeal. There is no justification whatsoever for continuing this respondent as a party if the suit is, as plaintiff claims at page 10 of his brief, "a suit in equity to construe two contracts" since neither Dura nor this defendant is, or was, a party to either contract.

II. In Any Event This Action is Not Such as to Call for the Exercise of This Court's Discretionary Power to Grant Its Writ of Certiorari.

Wholly apart from the separate position of this respondent, it is respectfully urged that the case stated by petitioner does not call for issuance of a writ of certiorari as against any of the defendants. Petitioner bases his application and states his reason for allowance of the writ as being first, that the lower court has decided an important question of law in conflict with the applicable legal decisions, in conflict with the weight of authority, and in conflict with the decisions of this Court, and sec-

ond, that the lower court has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The second ground may be quickly passed. Nowhere has petitioner pointed out any manner in which either the District Court or the Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings. No exceptional or unjudicial conduct is revealed. All that appears is that petitioner is dissatisfied because he has lost a lawsuit which was fully tried and argued in the District Court, and extensively briefed and argued upon appeal in the Circuit Court of Appeals for the Sixth Circuit.

Nor is there any merit to the first ground stated by petitioner. Wholly apart from the merits of the claimed construction of the two contracts, Exhibits 158 and 159 (and to adopt petitioner's construction it is necessary to hold that the parties used the word "patents" innumerable times in such contracts, and every time correctly, except once when petitioner claims they meant "inventions") the issue does not involve an important question of local law. Adopting petitioner's own theory as to the nature of the case, the question is one of construction of the words used in an ordinary license agreement between private parties. No precedent of public significance is involved. The general principles of law which petitioner claims were not followed are not, and never were, in dispute. The case involves only their application to its particular facts. On petitioner's own theory a narrow issue of the construction of particular words used in particular contracts between particular parties is all that is decided by the case.

Respondent, Detroit Harvester Company, respectfully requests that the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit be denied.

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Detroit Harvester Company.

Supreme Court of the United States

DAVID P. LAWRENCE,

FERRO

BRIEF OF

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Of Counsel.

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In The

Supreme Court of the United States

October Term, 1941.

No. 858.

DAVID P. LAVIETES,

Petitioner (Plaintiff-Appellant),

v.

FERRO STAMPING AND MANUFACTURING COMPANY, a Michigan Corporation; JOHN H. ROETHEL, WILLIAM C. DEVEREAUX, ELMER J. GRAY, ACKERMAN, BLAESER & FEZZEY, INC., a Michigan Corporation; TERNSTEDT MANUFACTURING COMPANY, a Michigan Corporation; AUTOMOBILE VENTILATION, INC., a Michigan Corporation; and DETROIT HARVESTER COMPANY, a Michigan Corporation,

Respondents (Defendants-Appellees).

BRIEF OF RESPONDENTS FERRO STAMPING AND MANUFACTURING COMPANY, JOHN H. ROETHEL, WILLIAM C. DEVEREAUX, ELMER J. GRAY, ACKERMAN, BLAESER & FEZZEY, INC., AND AUTOMOBILE VENTILATION, INC., IN REPLY TO PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

There Are No Grounds For the Granting Of a Writ Of Certiorari In This Case.

According to the petition for writ of certiorari and supporting brief, this is an action in equity to construe two

contracts as one instrument. The only question before this Honorable Court is whether or not a writ of certiorari should be granted in order that this court may review the decisions of the District Court and the Circuit Court of Appeals in construing such contracts as separate agreements.

Obviously this is not a case in which certiorari will lie. The situation is not one in which there is a conflict in the construction of like or similar contracts by two Circuit Courts of Appeals, nor one which presents other special or important grounds of the character indicated by Rule 38 (5). As the case merely involves the construction of ordinary agreements, certiorari should be denied. We quote from the address of Mr. Chief Justice Hughes at the American Law Institute meeting, as reported in *XX American Bar Association Journal, No. 6, page 341:*

> "But we find that a very large proportion of the applications (for writs of certiorari) are without substantial grounds. Yet the papers submitted must be examined, although on examination the futility of the application is disclosed. *For example, we have many applications where the questions raised are those relating to particular contracts or transactions and turn upon the facts of the particular case, and there is no controversy of importance with respect to legal principles.* Applications are numerous in which there appears to be no conflict of decision between the Circuit Courts of Appeals, or between Federal and State courts in cases where the latter should be controlling, and no real conflict with the decisions of the Supreme Court, and there is an utter absence of any good reason for asking our review. That review, we must emphasize, is in the interest of the law, not in the interest of particular parties. It is not the importance of the parties or the amount involved that is controlling, but the need of securing harmony of

> decision and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately administered." (Italics ours.)

In *Magnum Import Company v. Coty (1922), 262 U. S. 159, 163, 67 L. Ed. 922, 924,* Mr. Chief Justice Taft makes the following statement:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: First, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.* Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ." (Italics ours.)

In *Hamilton-Brown Shoe Company v. Wolf (1915), 240 U. S. 251, 258, 60 L. Ed. 629, 633,* Mr. Justice Pitney, in reference to writs of certiorari, stated:

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."

Petitioner, however, sets forth two grounds upon which he claims a writ of certiorari should be allowed, both grounds being entirely inapplicable. It is petitioner's claim: (1) that the Lower Court has decided an important question of local law in a way in conflict with the applicable local decisions; (2) That the Lower Court

has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

As to the second ground, we have examined the petition for writ of certiorari and supporting brief and are satisfied that petitioner has completely eliminated from his petition and brief any discussion of his claim that there was a departure from the accepted and usual course of judicial proceedings. It suffices to say that the record itself shows no such departure.

Petitioner's argument, which is devoted entirely to the first ground, sets forth fundamental rules of law which no court would deny, namely; that the intention of the parties governs the interpretation of contracts, that admissions of parties are admissible against them in evidence, and that pleadings may be amended. These rules of law have never been disputed by the District Court nor the Circuit Court of Appeals in this case, nor by counsel.

The only portion of the argument which we need discuss at all is that relating to the intention of the parties, the other points not being embodied in the assignments of error (R. 124-131) and not being related to the question of the construction of the contracts. Petitioner is asking that Exhibit 158 (R. 1188A-1188C; 283) and Exhibit 159 (R. 1188D; 292) be construed as one contract and that he may be permitted to share equally in the royalties given to defendant Roethel under Exhibit 159, in spite of the fact that petitioner was not a party to Exhibit 159, but only to Exhibit 158. Petitioner discusses a number of cases involving agreements entirely different from Exhibits 158 and 159. In regard to Exhibits 158 and 159,

the two agreements are not between the same parties and do not cover the same subject matter. Exhibit 158 relates only to patents and patent applications pending prior to September 6, 1930. Exhibit 159 has to do only with inventions and improvements developed by Roethel subsequent to September 6, 1930, while he was in the employ of defendant Ferro Stamping and Manufacturing Company (R. 1188A-1188D).

It is well settled that contracts are read as one only where the parties and the subject matter are the same. In *Positype Corporation v. Mahin (1929; C. C. A. 2d), 32 Fed. (2d) 202, 204,* the court said:

> "Several instruments between the same parties, executed at the same time, and dealing with the same subject matter, are read as one; but the absence of one or more of such elements of identity may make clear that the instruments are independent of each other. For instance, where the parties to the instrument are different, they do not constitute one agreement *(Pittsburgh, C. & St. L. R. Company v. Keokuk & H. Bridge Company, 131 U. S. 371, 9 S. Ct. 770, 33 L. Ed. 157; Pittsburgh, C. & St. L. R. Company v. Keokuk & H. Bridge Company, 155 U. S. 156, 15 S. Ct. 42, 39 L. Ed. 106),* * * * or where the subject matter is different *(Bailey v. Ry. Company, 17 Wall. (84 U. S.) 96, 21 L. Ed. 611; Lillard v. Ky. Distilleries & Warehouse Company (C. C. A.), 134 F. 168).*"

The Trial Court found that the contracts meant exactly what they said, were unambiguous and that Lavietes acquired no interest under Exhibit 159 (111). In other words, the court did determine what the intention of the parties was and interpreted the contract accordingly. Petitioner's petition for a writ of certiorari is actually

based upon his disagreement with the facts of the case relative to the intention of the parties as found by the Trial Court and concurred in by the Circuit Court of Appeals. In *Page v. Arkansas Natural Gas Corporation (1932), 286 U. S. 269, 76 L. Ed. 1096,* and numerous other cases, this Honorable Court has held that it will not review findings of fact in which both courts below concur.

In view of petitioner's claim that the suit is one to construe two contracts as one instrument, we believe the court will agree that petitioner is not claiming certiorari as against the defendants who were not parties to such contracts. The defendants who were not parties to such contracts were joined in this action because of petitioner's claim that the defendants fraudulently conspired to deprive petitioner of his interest under an alleged oral contract with defendant Roethel. Petitioner abandoned this claim on the appeal, the Lower Court having found that under the facts there was no evidence of fraud, no evidence of a conspiracy and no oral contract.

All litigation must come to an end. This case has been thoroughly argued in the District Court and before the Circuit Court of Appeals. In the Circuit Court of Appeals Petitioner filed a voluminous brief with a separately bound appendix, a supplementary brief, reply briefs, a motion for rehearing and a motion for oral argument on the motion for rehearing. He now asks this court to review the decisions of the District Court and the Circuit Court of Appeals on the sole question of whether such courts were correct in holding that separate instruments, having different parties and different subject matter, were not to be construed as a single contract so as to permit a party to one of the instruments to share in the benefits under both. There is no question of any conflict

existing between the decisions of two Circuit Courts of Appeals. It is obvious that no important question of local law has been decided by the Lower Court to any extent in conflict with any applicable local decisions. We again quote an excerpt from the previously quoted remarks of Mr. Chief Justice Taft, in *Magnum Import Company v. Coty, supra,* in reference to the United States Supreme Court granting a writ of certiorari:

> "The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

We respectfully urge that the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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Dated February 28, 1942.